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Nos. 00-1751, 00-1777, and 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL., *PETITIONERS*

v.

DORRIS SIMMONS-HARRIS, ET AL., *RESPONDENTS*

HANNA PERKINS SCHOOL, ET AL., *PETITIONERS*

v.

DORRIS SIMMONS-HARRIS, ET AL., *RESPONDENTS*

SENEL TAYLOR, ET AL., *PETITIONERS*

v.

DORRIS SIMMONS-HARRIS, ET AL., *RESPONDENTS*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Does the expansive interpretation given to the Establishment Clause by the Sixth Circuit Court of Appeals impermissibly intrude on the core state function of providing for the health, safety, welfare, *and morals* of the people and unduly interfere with the right of parents to direct the moral upbringing of their children?

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that among the core powers reserved to the states or to the people is the power to further the health, safety, welfare and morals of the people through education, and that parents have the fundamental right to seek proper moral as well as intellectual instruction for their children. The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute has published a number of books and monographs of particular relevance here, on the effectiveness, and the Constitutionality, of school choice programs, including Christopher Flannery, *Moral Ideas for America: Educating Americans,* and Lance Izumi, *The Verdict Is in: California's Public Schools Are Miserably Managed.* In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, in order to further advance its mission. The Center's purpose is to promote the mission of the Claremont Institute through strategic litigation, including the filing of *amicus curiae* briefs in cases such as this, involving issues of constitutional significance going to the heart of our nation's founding principles.

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

The Center has previously participated in this case as *amicus curiae* in support of the petition for a writ of certiorari, and has participated as *amicus curiae* in this Court in such other important cases as *Adarand Constructors* v. *Mineta*, No. 00-730 (pending); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

STATEMENT OF THE CASE

American public schools are facing a crisis. Every day, children are threatened by violence, drug abuse, and sexual pressures; test scores are continually falling, and students are failing to graduate. The effects are particularly harsh on minorities. 69 percent of black high school seniors scored below basic proficiency levels on math tests in 2000; 43 percent scored below basic proficiency levels in reading. Rodger Doyle, *Can't Read, Can't Count,* SCIENTIFIC AMERICAN, Oct. 2001 at 24. More than 38 percent of job applicants lack basic reading, writing, or math skills, which "portents higher unemployment and lower pay...and certainly is a major contributor to poverty." *Id.*

Cleveland, Ohio's public schools have only a 38 percent graduation rate, and only 12 percent of sixth grade students passed the state's mathematics proficiency test in 1999. *Failing Cleveland's Students*, WASHINGTON TIMES, 1999 WL 3092877 (Aug. 26, 1999). Many parents wish to escape the ailing public education system by placing their children in private schools, but some cannot afford that alternative. In response to this problem, a number of States have set up school choice programs allowing parents to designate a school for their children to attend; if parents choose to send their child to a private school, the State then helps those parents by contributing toward the tuition a certain amount of the money which the state was already going to spend on the student in a government school. This increases the number of choices available to parents, and in their competi-

tion for students, the schools will improve their quality.[2] In *Simmons-Harris* v. *Goff*, 711 N.E.2d 203 (Ohio 1999), the Ohio Supreme Court held that this program did not violate the Establishment Clause of the First Amendment, because participation in the program is equally open to both religious and nonreligious schools, without government favoritism. As a result, "[w]hatever link between government and religion [that] is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government.... No other aspect of the statutory scheme involves the government in indoctrination." *Id.* at 7. But in *Simmons-Harris* v. *Zelman*, 234 F.3d 945 (6th Cir. 2000), the Sixth Circuit Court of Appeals held that the program does violate the Establishment Clause, because religious schools—being more competitive—are more likely to attract customers. *See id.* at 959 ("Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs").

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[2] The results have, indeed, been improved test scores, greater number of scholarships for students, and increased parent satisfaction. *See, e.g.*, Thomas C. Dawson and Eric A. Helland, *Helping Hand: How Private Philanthropy and Catholic Schools Serve Low-Income Children in Los Angeles* (Pacific Research Foundation Study, 2001) (finding that Catholic schools in inner cities spend less than half the amount per student as public schools, yet achieve higher test scores); David Myers, et al., *School Choice in New York City after Two Years: An Evaluation of the School Choice Scholarships Program* (John F. Kennedy School of Government Study, 2000) (finding New York City's school choice plan resulted in safer campuses and increased test scores, especially among minority students); Paul Peterson *et al.*, *An Evaluation of the Cleveland Voucher Program after Two Years* (John F. Kennedy School of Government Study, 1999) (finding that the Cleveland Scholarship Program involved in this case achieved greater parental satisfaction and an average test-score increase of about forty percent).

SUMMARY OF ARGUMENT

The Cleveland Scholarship Program does not violate the Establishment Clause. The Founders who wrote that clause never intended that it should be read to prohibit a state from increasing parents' range of options in educating their children, nor did they intend that clause to prevent parents from seeking moral, as well as intellectual instruction for their children. Indeed, the best evidence suggests just the opposite: the Establishment Clause was designed not just to prevent the establishment of a national church but to prohibit the federal government from interfering with state encouragement of religion as the states exercised their core police powers to protect the health, safety, welfare, *and morals* of the people.

Moreover, this Court has held that providing children with moral education is not only a fundamental right, but a parental *duty*. The Cleveland Scholarship Program assists parents in fulfilling that duty—a duty the Founders agreed was of profound importance in maintaining American institutions. To hold that the Constitution prohibits the State from assisting parents who seek such moral instruction for their children would ignore the history and intent of the First Amendment.

Finally, this Court has repeatedly held that a government program that benefits a religious institution only as a consequence of genuinely independent parental decisions does not violate the Establishment Clause. This is precisely what the Cleveland Program does. Whether or not a majority of private schools participating in the program are religious, therefore, is irrelevant as long as the governmental program itself leaves the decision to attend any particular school to the parents. Because nothing in the program at issue here encourages parents to choose religious schools over non-religious schools or otherwise shows a governmental preference for religious schools as opposed to other schools that choose to participate in the program, the program passes muster under current Establishment Clause jurisprudence.

ARGUMENT

I. The Cleveland Scholarship Program Helps Further The Moral Instruction That Our Nation's Founders Thought Critical In A Republican Form Of Government.

America's founders believed that the education of children was vital to keeping America a free and functioning society. "If a people expect to be ignorant and free," said Thomas Jefferson, "they want what never was, and never can be, in the history of the world." *Letter from Thomas Jefferson to Charles Yancey*, (Jan. 6, 1816), *in* 10 THE WORKS OF THOMAS JEFFERSON 493, 497 (P. Ford ed. 1905). James Madison agreed:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.

Letter from James Madison to William Barry, (Aug. 4, 1822), *in* MADISON: WRITINGS 790 (J. Rakove, ed., 1999).

But by "education," the founders did not merely mean the dissemination of the facts of science or history; they meant also the inculcation of moral character. Following Montesquieu's well-known admonition that education in a republic, unlike that in a despotism or a monarchy, must necessarily be designed to inculcate virtue in the citizenry, *see* MONTESQUIEU, THE SPIRIT OF THE LAWS 13, 15 (T. Nugent trans., Britannica Great Books 1952) (1748), our nation's Founders repeatedly acknowledged the role that moral virtue had to play if their experiment in self-government was to be successful. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm

adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15. The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality ...." Mass. Const. of 1780, Pt. 1, Art. 3.

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

The Federalist No. 55, at 346 (C. Rossiter and C. Kesler eds., 1999).

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. They were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Many of the leading Founders, therefore, proposed plans for educational systems that would help foster the kind of moral virtue they thought necessary for self-government.

Perhaps the best example of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest*

of the River Ohio, Art. 3, 1 Stat. 51, 53 n. a (July 13, 1787, re-enacted Aug. 7, 1789); *see also, e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties"). Even Thomas Jefferson, who coined the phrase "a wall of separation between church and state," *Letter to the Danbury Baptist Association*, Jan. 1, 1802, *in* JEFFERSON: WRITINGS 510 (M. Peterson, ed. 1984), provided in his famous proposal for a public education system in Virginia that "[t]he first elements of morality" were to be instilled into students' minds. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA *reprinted in id.* at 125, 273 (1785).

As the Northwest Ordinance makes clear, the fostering of moral excellence was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, Farewell Address, *reprinted in* William B. Allen, ed., George Washington: A Collection 521 (1988). Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in* Merrill Jensen, ed., 2 *Documentary History of the Ratification of the Constitution* 595 (1976). Accordingly, he proposed a public school system whose curriculum included religious instruction, noting that such an education would "make dutiful children, teachable scholars, and afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peacable sailors, and, in everything that relates to this country, good citizens." Benjamin Rush, To The Citizens of Philadelphia: A Plan for Free Schools, *reprinted in* L.H. Butterfield, ed., 1 Letters of Benjamin Rush 412, 424 (1951) (1786).

In addition, several of the States explicitly provided for religious education in their State constitutions. The

Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning...shall be encouraged and protected." Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning, shall be encouraged and protected"). The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 went even further. The Massachusetts Constitution provides:

> The people of this Commonwealth have the right to invest their legislature with power to authorize and require...the several towns...or religious societies to make suitable provision at their own expense...for the support and maintenance of public protestant teachers of piety, religion and morality.

Mass. Const. of 1780, Pt. I § 3. And New Hampshire's Constitution authorized the legislature

> to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety...will give the best and security to government ....

N.H. Const. of 1784, Pt. I § 5.

While no State has, since the 1830s, supported such a starkly sectarian establishment of religion as is evident in the Massachusetts and New Hampshire constitutions' references to "protestant teachers," several continue to recognize the importance of moral-religious instruction in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.*, Nebr. Const. Art. 1, § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature ... to encourage schools and the means of instruction"); Vt. Const. ch. II, § 68; Ind. Const. Art. 8, § 1;

Iowa Const., Art. IX, § 3; *see also* Mass. Ann. Laws ch. 71, § 30 (2001) (providing that it is the "duty" of Harvard professors and other teachers of youth "to impress on the minds of children and youth committed to their care and instruction the principles of *piety* and justice" (emphasis added)).

Particularly where, as here, individual parents remain free to direct the state's tuition support to schools of their own choosing, any incidental benefit to religion would have been viewed by the Founders as an added benefit, not a constitutional impediment. Benjamin Rush addressed this point in his proposal for a public education system: "The children of parents of the same religious denominations should be educated together," he wrote, "in order that they may be instructed with the more ease in the principles and forms of their respective churches." Benjamin Rush, "Plan for Free Schools," *supra*. "If each society in this manner takes care of its own youth," he noted, the whole republic must soon be well educated." Benjamin Rush, "To The Citizens of Pennsylvania of German Birth and Extraction: Proposal of a German College," *reprinted in* Butterfield, *supra*, at 364.

Given the Founders' views on the subject, the Sixth Circuit's holding that the Constitution they drafted and ratified mandates the *exclusion* of religious schools from the general tuition support program at issue here is extraordinary. Indeed, from the Founders' vantage point, such a holding would have been viewed as dangerous, because it thwarts rather than supports the very kind of moral-religious education that the Founders thought so necessary to the preservation of free government. *Cf.* Martin Luther King, Jr., THE WORDS OF MARTIN LUTHER KING JR. 41 (Coretta Scott King, ed., 1993) ("education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason but with no morals. We must remember that intelligence is not enough. Intelligence plus character—that is the goal of education").

II. Interpreting The Establishment Clause To Bar Ohio From Enacting A Program Which Allows Parents To Send Children To Religious Schools Is Incompatible With This Court's Recent Federalism Jurisprudence.

A. Education is a Core Function, Perhaps *The* Core Function, of State and Local Governments.

This Court's recent federalism decisions further demonstrate the error of the decision below. As this Court has often acknowledged, the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the states or to the people. *See, e.g., United States* v. *Lopez*, 514 U.S. 549, 552 (1995); U.S. CONST. amend. X. As James Madison explained:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

Federalist No. 45 (J. Madison).

Education is among the most important of those duties not delegated to the federal government but reserved to the states or to the people, and as the discussion in Part I above demonstrates, moral instruction, particularly including the kind of moral instruction fostered by religion, has for most of our nation's history been viewed as an essential component of that core state function. Thus, any proper interpretation of the Establishment Clause—at least as it applies to the states—simply must recognize the important place religion has always played in state efforts to undertake this core police power.

B. Applying An Expansive Interpretation of the Establishment Clause to the States Threatens to Undermine Core The State Police Power to Regulate *The Morals* of the People.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was originally intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law ..." meant precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly true with respect to the Establishment Clause, whose language, "Congress shall pass no law *respecting* the establishment of religion," was designed with a two-fold purpose: to prevent the federal government from establishing a national church; and to prevent the federal government from interfering with the state established churches and other state aid to religion that existed at the time. *See, e.g.*, W. Katz, Religion and American Constitutions 8-10 (1964); M. Howe, The Garden and the Wilderness 23 (1965) (both cited in G. Stone, et al., eds., Constitutional Law 1539 (3d ed. 1996); *see also* Neil Cogan, The Complete Bill of Rights 1-8, 53-62 (1997) (reprinting the debates in Congress leading to the proposal of the First Amendment's religion clauses).

Of course, the 14th Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. But the Establishment Clause is on its face different in kind than the other provisions of the Bill of Rights that had previously been incorporated and made applicable to the states via the 14th Amendment. The Free Speech and Free Exercise Clauses, for example, are much more readily described as protecting a "liberty" interest or a "privilege" of citizenship than is the Establishment Clause, yet when this Court in

Everson v. *Board of Ed.*, 330 U.S. 1 (1947), held that the Establishment Clause was incorporated and made applicable to the States via the Due Process clause of the 14th Amendment, it merely cited its prior cases incorporating the Free Speech and Free Exercise clauses, without any analysis of the evident differences between them and the Establishment Clause. *See id.*, at 5 (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), a free exercise case); *id.*, at 15 (citing, e.g., *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a free exercise case, which in turn relied upon *Schneider* v. *State*, 308 U.S. 147 (1939), a free speech case).

Moreover, the application of the Establishment Clause to the states has allowed the federal courts and, via section 5 of the 14th Amendment, the Congress, to do the very thing the clause was arguably designed to prevent, namely, interfere with state support of religion. Indeed, the constitutional prohibition on federal intrusion into this area of core state sovereignty is much more explicit than the prohibition on federal commandeering of state officials, *see New York* v. *United States*, 505 U.S. 144 (1992), the limits of federal power inherent in the doctrine of enumerated powers, *see United States* v. *Lopez*, 514 U.S. 549 (1995), or even the barrier to federal power erected by the doctrine of state sovereign immunity that this Court has held to be implicit in the 11th Amendment, *see Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). Yet in each of these latter areas, this Court has in recent years given renewed attention to the limits of federal power.

This Court need not revisit the long-standing precedent incorporating the Establishment Clause, however, in order to give due consideration to that precedent's effect on federalism. All that is required is for this Court to recognize that the scope of activity prohibited by the Establishment Clause may well be narrower with respect to the States than with respect to the Federal government. Such a distinction is particularly important in light of the fact that the States rather than the federal government have historically been

viewed as the repository of the police power—that power to regulate the health, safety, welfare, *and morals* of the people. *See, e.g., Barnes* v. *Glen Theatre, Inc.*; 501 U.S. 560, 569 (1991); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 304 (1932). Thus, even if the Sixth Circuit's "no aid to any or all religions, directly or indirectly," were an appropriate interpretation of the Establishment Clause vis-à-vis the federal government, the application of such a rule in the incorporated Establishment Clause context intrudes upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the 14th Amendment.

While a renewed appreciation of this core function of state sovereignty might well support even direct aid to religion (at least if it is offered on a non-sectarian basis), at the very least it must permit a religiously neutral program such as the Cleveland Scholarship Program at issue here, in which any aid to religion is only indirect, the result of wholly independent decisions by parents who freely choose whether to send their children to their neighborhood public school, a participating public school in an adjoining district, a non-religious private school, or a religious private school.

III. The Cleveland Scholarship Program Does Not Violate The Establishment Clause Even As Considered Apart From This Court's Federalism Decisions.

A. The Circuit Court Misread This Court's Establishment Clause Jurisprudence in Finding That The Cleveland Scholarship Program Constitutes an Establishment of Religion.

The Court below based its opinion largely on *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973). Yet this Court has acknowledged that "Establishment Clause jurisprudence has changed significantly" since the *Nyquist* case. *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997). Where the *Nyquist* ruling was based on the then-new test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court has

since that time repeatedly criticized the *Lemon* test. *See, e.g., Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia and Thomas, J.J., concurring in the judgment). In *Agostini,* the Court noted that "[w]hat has changed...is our understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Agostini*, 521 U.S. at 223.

Agostini held "that a federally funded program providing supplemental, remedial *instruction* to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees[.]" *Id.* at 234-235. The Cleveland Scholarship Program is narrower than the law in *Agostini,* because it does not go so far as to permit government employees to teach on the campus of a sectarian school. And it includes the protections for religious neutrality—including a provision which prohibits participating schools from discriminating on the basis of religion—which ensured that the more far-reaching program in *Agostini* was constitutional.

B. The Cleveland Scholarship Program Allows Parents Freely to Choose Which Schools Their Children Will Attend.

This Court has repeatedly held that a government education program whose incidental benefits to a religious group are the result of purely private individual choices, does not violate the Establishment Clause. *Mitchell* v. *Helms,* 530 U.S. 793 (2000); *Agostini, supra*; *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Bowen* v. *Kendrick,* 487 U.S. 589 (1988); *Witters* v. *Washington Dept. of Svcs. for Blind*, 474 U.S. 481 (1986); *Mueller* v. *Allen,* 463 U.S. 388 (1983). Simply put, "government doesn't necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage." Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 ND J.L. ETHICS & PUB.

POL'Y 341, 357-358 (1999).

In *Mueller*, the Court considered a Minnesota law which permitted parents to deduct from their state taxes the amount of money they spent in sending children to private schools, including religious ones. The Court held that the deduction did not violate the Establishment Clause, and distinguished it from the law considered in *Nyquist*. "[U]nder Minnesota's arrangement," the Court held,

> public funds become available only as a result of numerous private choices of individual parents of school-age children. For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance.... Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no "imprimatur of state approval," can be deemed to have been conferred on any particular religion, or on religion generally.

Mueller, 463 U.S. at 399.

Under the Cleveland Scholarship Program, "any money that ultimately [goes] to religious institutions d[oes] so 'only as a result of the genuinely independent and private choices of' individuals." *Agostini*, 521 U.S. at 226. The State of Ohio no more endorses a religious viewpoint—or sends a message of favoritism for a religious viewpoint—than it endorses cabbage by providing poor people with food stamps. Yet the Circuit Court found this freedom of choice to be "illusory" because "82 percent of the participating schools were sectarian." *Simmons-Harris* v. *Zelman*, 234 F.3d 945, 959 (6th Cir. 2000). In other words, unless the number of secular and sectarian private schools participating in the program is kept exactly balanced—presumably through some sort of quota system—the program will constitute an establishment of religion.

The fact that most of the schools participating in the program are religious is utterly irrelevant to the determina-

tion of whether the program establishes religion in violation of the First Amendment. By the same logic, one might declare that *everything* government does violates the First Amendment. After all, the vast majority of Americans are religious,[3] so it must necessarily be the case that "the great majority" of people who benefit from police or fire services, education or health care services, "are sectarian." *Cf. Zelman*, 234 F.3d at 958. But this Court has rejected the attenuated view that every private action must become state action if the government has been involved at any point. *See, e.g., Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972) (warning against "holding[s which] would utterly emasculate the distinction between private as distinguished from state conduct"). By way of analogy, this Court has rejected attenuated readings of the Commerce Clause which would define every conceivable activity as "interstate commerce." *See, e.g., United States* v. *Morrison*, 529 U.S. 598 (2000). For the same reasons, the private choices of parents do not become an establishment of religion when those choices are backed up by funding *which would have gone to educate the child anyway*. In short, as the Ohio Supreme Court held, "[t]o the extent that children are indoctrinated by sectarian schools receiving tuition dollars that flow from the School Voucher Program, it is not the result of direct government action." *Simmons-Harris* v. *Goff*, 86 Ohio St. 3d 1, 7 (1999).

The Circuit Court held that the Cleveland Scholarship Program was not religiously neutral. As the dissent below noted, this conclusion lacked even "a scintilla of evidence." *Zelman*, 234 F.3d at 970 (Ryan, J., dissenting in part). Indeed, the majority opinion acknowledged that "the voucher program does not restrict entry into the program to religious or sectarian schools[.]" *Id.* at 959. Yet it went on to find the program non-neutral because religious schools "often have low overhead costs, supplemental income from private

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[3] Over 91 percent of Americans describe themselves as religious. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 62 (2000).

donations, and consequently lower tuition needs." *Id.*, (citing Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 262 (1999)).

In other words, because religious schools are cheaper, a program which grants benefits *equally* to religious and non-religious schools is made *unequal* precisely *because it does not discriminate*. This definition of neutrality is either Orwellian or meaningless, and it is contrary to this Court's repeated holding that religious and non-religious organizations should be treated equally, regardless of whether the church involved happens to be better situated to benefit from the equal treatment. By the same reasoning, a religious student organization that had access to the resources of its affiliated national religious society might better be able to publish a student newsletter without receipt of student activities fees, but this Court has held that depriving the group equal access to the forum provided by the fees was not compelled by the Establishment Clause. *Rosenberger* v. *Rector of the University of Virginia*, 515 U.S. 819 (1995).

Since the Cleveland Scholarship Program is open to non-religious schools on an equal basis, it cannot be characterized as an establishment of religion. The fact that secular schools do not choose to participate to the same extent as religious schools may be due to any number of factors—for example, the greater dedication which religious associations have traditionally had to the upbringing of children, or the fact that most Americans happen to be religious. The private choices that lead a religious association to participate in the program deserve as much respect as the private decision of parents to participate in the program at the other end. In neither case is there any discriminatory process by which the state chooses to foster one religion over another, or religion in general over irreligion. Just as in the racial discrimination cases such as *Washington* v. *Davis*, 426 U.S. 229 (1976), disproportionate impact without discriminatory intent can not violate the

Equal Protection Clause, so, too, when the Cleveland Scholarship Program provides an equal opportunity for religious and non-religious groups to participate, the fact that most participants happen to be religious can not violate the Establishment Clause, especially in a nation where most people are religious.

C. The Cleveland Scholarship Program Does Not Indoctrinate In, Define By, or Entangle Government With Religion.

To determine whether a government program has an impermissible effect under the lingering *Lemon* test, this Court has recently asked whether it "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement." *Agostini,* 521 U.S. at 234. The Cleveland Scholarship Program does none of these things. The Program does not result in governmental indoctrination because no "religious indoctrination that occurs in these schools could reasonably be attributed to government action." *Mitchell,* 530 U.S. at 809 (Thomas, J., plurality opinion). Indeed, the whole reason parents wish to send their children to private religious schools is because they are *dissatisfied* with government action to begin with; it is unlikely that they would get the impression that the religious school is acting as a government entity.

The Circuit Court admitted—although it later obscured—that the program does not define its recipients on the basis of religion. *Zelman,* 234 F.3d at 958. The law, in fact, prohibits schools from choosing or refusing students on the basis of religion, ORC §3313.976(A)(4), and prohibits participating schools from teaching "hatred of any person or group on the basis of...religion." *Id.* The Program defines participants only on the basis of class size or family income. *Id.;* ORC § 3313.978(A).

The program does not create an excessive entanglement with a religious organization, either. In assessing

"entanglement," the Court looks to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Agostini*, 521 U.S. at 232 (*quoting Lemon*, 403 U.S. at 615). In *Agostini*, this Court held that a finding of excessive entanglement could not rest on the ground that a government program would require "administrative cooperation" between the State and religious schools. *Id.* at 233-234. *Agostini* found no excessive entanglement in a statutory scheme far more "entangled" than the Cleveland Scholarship Program. In fact, the Cleveland plan is even narrower than the educational systems advocated by the Founders. It does not seek to have public officials teach moral virtue, which the Founders accepted as a constitutionally legitimate—indeed, imperative—governmental purpose. The Cleveland program merely allows parents to direct their tax dollars—which would have gone to education anyway—to the school they think proper for their children to attend.

In short, the Cleveland Scholarship program is precisely what the plurality in *Mitchell* v. *Helms* hypothesized:

> [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.

530 U.S. at 809-810 (Thomas, J., plurality opinion) (citation omitted).

CONCLUSION

The opinion of the Court of Appeals for the Sixth Circuit should be *reversed.*

Respectfully submitted,

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